

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF THE UNITED STATES

October Term, 1922
1922

NO. 13

REBEKAH GORDON, COMMISSIONER OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF PENNSYLVANIA
PETITIONER

VS.

ALEXANDER D. STOCKTON, SOLO SURVIVOR TRUSTEE
UNDER THE WILL OF ALEXANDER J. DERTYHILL
DECEASED

IN WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

REPORT FOR CIRCUIT COURT, SEPTEMBER 11, 1922
CIRCUIT COURT AND SUPREME COURT NOVEMBER 1, 1922

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 543.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA,
PETITIONER,

vs.

ALEXANDER D. STOCKTON, SOLE SURVIVING TRUSTEE
UNDER THE WILL OF ALEXANDER J. DERBYSHIRE,
DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

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In the District Court of the United States, for the Eastern District of Pennsylvania. June term, 1918. No. 5628.

Docket entries.

- | | |
|----------------------------------------------------------------------------------------------------|---------------------------------|
| ALEXANDER D. STOCKTON, sole surviving trustee under the will of Alexander J. Derbyshire, deceased, | Prichard, Saul, Bayard & Evans. |
| v. | |
| EPHRAIM LEDERER, collector internal revenue. | Francis Fisher Kane. |
- July 24, 1918. Praecipe for summons, filed.
- " 24, " Summons exit—returnable first Monday in August, 1918.
- " 24, " Exhibit "A" filed.
- " 24, " Notice to file affidavit of defense filed.
- " 30, " Appearance of Francis Fisher Kane, Esq., for defendant, filed.
- Aug. 28, 1918. Affidavit of defense filed.
- Oct. 23, 1918. Summons returned "served" and filed.
- Feb. 1, 1919. Stipulation of counsel waiving trial by jury, filed.
- Mar. 4, 1919. Order to place case on argument list, filed.
- " 5, " Order of court fixing time for hearing, filed.
- Mar. 26, 1919. Trial before court without a jury.
- Apr. 25, 1919. Testimony filed.
- Nov. 25, 1919. Plaintiff's requests for findings of fact filed.
- Nov. 25, 1919. Defendant's requests for conclusions of law, filed.
- Dec. 23, 1919. Opinion, Dickinson, J., directing judgment in favor of plaintiff, filed.
- " 29, " Order for judgment and assessment of damages, filed.
- " 29, " Assessment of damages filed.
- " 29, " Judgment filed.
- Jan. 21, 1920. Certificate of probable cause filed.
- " 27, " Defendant's exceptions to conclusion of law and findings of fact, filed.
- Feb. 4, 1920. Assignments of error filed.
- " 4, " Petition for writ of error, filed.
- Mar. 4, " Order of court granting prayer of petition, filed.
- Mar. 4, " Praecipe for transcript of record, filed.
- Mar. 4, " Writ of error allowed and copy thereof lodged in clerk's office for adverse party.
- Mar. 4, " Citation allowed and issued.
- Mar. 1, 1920. Citation returned "service accepted" and filed.

- 3 In the District Court of the United States for the Eastern District of Pennsylvania. September term, 1918. No. 5800.

Docket entries.

ALEXANDER D. STOCKTON, sole surviving trustee under the will of Alexander J. Derbyshire, deceased,	}	Prichard, Saul, Bayard & Evans.
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v.

EPHRAIM LEDERER, collector internal revenue.	}	Francis Fisher Kane.
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- Nov. 16, 1918. Praecipe for summons, filed.
- “ 16, “ Summons exit—returnable first Monday in December, 1918.
- “ 16, “ Statement of claim, filed.
- “ 16, “ Exhibit “A” filed.
- “ 16, “ Notice to file affidavit of defense filed.
- “ 26, “ Summons returned “served” and filed.
- “ 30, “ Affidavit of defense filed.
- Feb. 1, 1919. Stipulation of counsel that case be tried before the court without a jury, filed.
- “ 1, “ Order to place case on trial list filed.
- Mar. 5, 1919. Order of court fixing time for hearing, filed.
- “ 26, “ Trial before court without a jury.
- Apr. 10, 1919. Testimony filed.
- Nov. 25, 1919. Plaintiff's requests for findings of fact, filed.
- “ 25, “ Defendant's requests for conclusions of law, filed.
- 4 Dec. 23, 1919. Opinion, Dickinson, J., directing judgment in favor of plaintiff, filed.
- Dec. 29, 1919. Order for judgment and assessment of damages filed.
- “ 29, “ Assessment of damages filed.
- “ 29, “ Judgment filed.
- Jan. 27, 1920. Defendant's exceptions to conclusions of law and findings of fact, filed.
- Feb. 4, 1920. Assignments of error filed.
- “ 4, “ Petition for writ of error filed.
- “ 4, “ Order of court granting prayer of petition, filed.
- “ 4, “ Writ of error allowed and copy thereof lodged in clerk's office for adverse party.
- “ 4, “ Citation allowed and issued.
- “ 4, “ Praecipe for transcript of record sur writ of error filed.
- Mar. 1, 1920. Citation returned “service accepted” and filed.

*Writ of error (No. 5628).*UNITED STATES OF AMERICA, *ss:**The President of the United States, to the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire and Ephraim

Lederer, collector of internal revenue, a manifest error hath
 5 happened, to the great damage of the said Ephraim Lederer, collector of internal revenue, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the
 [SEAL.] fourth day of February in the year of our Lord one thousand nine hundred and twenty.

GEORGE BRODBECK,

Clerk of the District Court of the United States.

Allowed by

O. B. DICKINSON, *J.**Writ of Error (No. 5800).*UNITED STATES OF AMERICA, *ss:**The President of the United States, to the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District
 6 Court, before you, or some of you, between Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire and Ephraim Lederer, collector of internal revenue, a manifest

error hath happened, to the great damage of the said Ephraim Lederer, collector of internal revenue, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the
 [SEAL.] fourth day of February in the year of our Lord one thousand nine hundred and twenty.

GEORGE BRODBECK,

Clerk of the District Court of the United States.

Allowed by

O. B. DICKINSON, J.

7 In the District Court of the United States for the Eastern District of Pennsylvania.

ALEXANDER D. STOCKTON, SOLE SURVIVING
 trustee under the will of Alexander J. Derbyshire, deceased.

v.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL
 revenue for the first district of Pennsylvania.

June Sessions, 1918.
 No. 5628.

Statement of plaintiff's demand.

(Filed July 24, 1918.)

1. Plaintiff claims to recover from the defendant the sum of \$4,273.42, together with interest thereon from the third day of July, 1917, all of which is justly due from the defendant to the plaintiff, as follows:

2. Plaintiff is the sole surviving trustee under the will of Alexander J. Derbyshire, deceased.

3. Defendant is the United States collector of internal revenue for the first district of Pennsylvania.

4. Alexander J. Derbyshire died on the 29th day of March, 1879, having first made and executed his last will and testament, dated the 9th day of fourth month, 1877, and since duly proved and of record in the office of the register of wills for the county of Philadelphia.

wherein and whereby after making certain specific bequests, he gave, devised, and bequeathed the residue of his estate to his executors and trustees, in trust, to pay three certain annuities; and further provided as follows:

“(1) And in trust further, and my said executors are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey” (the three annuitants above referred to) “and of the said Alexander J. Derbyshire, jr., before his arrival at the age of twenty-one years, to convey, assign, transfer, set over, and pay unto the contributors to the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said institution, all the rest, residue, and remainder of my estate, real and personal, and of the income, rents, issues, profits, and accumulations thereof which may remain in the hands of my said executors unsold or undisposed of as aforesaid after the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey, and Alexander J. Derbyshire, jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests, and sums of money hereinbefore and hereinafter devised and bequeathed or directed to be paid, and after paying for and discharging all the charges, taxes, repairs, and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management, and settlement of my estate and property as aforesaid and as hereinafter mentioned.”

A copy of said will is hereto annexed, marked Exhibit “A,” and made a part hereof.

5. Two of the said annuitants are now deceased; but the third, Caroline Derbyshire Schelling, is still living. The amount of her annuity is \$800 per annum.

6. All of the income, rents, issues, profits, and accumulations of the said estate other than the amount required for said annuities are, by the express provisions of said will, as above set forth, payable unto the contributors of the Pennsylvania Hospital, their successors and assigns. Said contributors to the Pennsylvania Hospital is a purely public charity and the said income is accumulated and held solely for the purposes of a corporation or association organized and operated exclusively for charitable purposes. No part of the net income of said contributors to the Pennsylvania Hospital is for the benefit of any private stockholder or individual.

7. On the 26th day of June, 1917, the defendant assessed plaintiff as such trustee an internal revenue tax upon the income of said trust estate, as follows:

Upon the income for the year 1913_____	\$666.58
Upon the income for the year 1914_____	896.42
Upon the income for the year 1915_____	992.23
Upon the income for the year 1916_____	1,718.19
Making a total of_____	\$4,273.42

8. Thereafter, under duress and to avoid distraint threatened defendant, the plaintiff on the 3rd day of July, 1917, paid to defendant the said sum of \$4,273.42.

9. No part of said sum was due or payable from the plaintiff to such trustee to defendant with respect to the income of said estate because, as above set forth, the annuity to the surviving annuitant Caroline Derbyshire Schelling, is \$800 per annum and therefore payable clear of income tax, under the statutes of the United States in such case made and provided; and all of said income not paid to said annuitant is payable after the death of said annuitant to the contributors to the Pennsylvania Hospital, a purely public charity whose income is exempt from taxation under said statutes.

10. Due application for the refund of said sum of \$4,273.42, paid as aforesaid, was made to the commissioner of internal revenue on the 10th day of July, 1917. But the said application was refused by the commissioner in the 4th day of June, 1918, wrongfully rejecting plaintiff's said claim.

11. Plaintiff therefore claims to recover from defendant said sum of \$4,273.42, with interest from the date of payment thereof, July 3, 1917.

PRICHARD, SAUL, BAYARD & EVANS,
Attorneys for plaintiff

Per J. W. BAYARD.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, ss:

Alexander D. Stockton, being duly sworn, says that he is the plaintiff in the above-entitled cause and that the facts set forth in the foregoing statement, as the basis of plaintiff's demand, are true.

ALEXANDER D. STOCKTON

Sworn to and subscribed before me this 5th day of July, 1918.

[SEAL.]

GEORGE HOLBERT, *Notary Public*

My commission expires on the 25th day of February, 1921.

Exhibit "A."

Copy of will.

I, Alexander James Derbyshire, merchant, of the city of Philadelphia, in the State of Pennsylvania, U. S. of America, being of sound and disposing mind and memory, do make and publish this my last will and testament, in manner and form following, that is to say:

First. I nominate and appoint my friend John W. Biddle, son of my esteemed friend and old schoolmate William Biddle; my cousin Joseph G. Henszey, son of my deceased uncle Samuel C. Henszey; Daniel W. Slack, who was in my service for more than twenty-years; and my cousin Alexander D. Stockton, now a member of my family, to be the executors of this my last will and testament.

Second. I charge my executors to collect, recover and receive all the debts, rents, income, dividends, and sums of money, property, and effects whatsoever that may be due, owing or belonging to me, whether arising from or out of real or personal estate or otherwise; but I authorize and desire my executors to continue the present investments of my personal estate so long as they may consider it prudent to do so without risk of loss.

Third. I direct my executors to settle, pay, and discharge all my just debts and funeral expenses as soon as practicable after my decease.

Fourth. I give and bequeath to Algernine D. Smith (who was tenderly reared by my deceased sisters from her childhood) the sum of two thousand dollars (\$2,000) absolutely, to be paid to her as soon as practicable after my decease, free from all charges and taxes.

Fifth. I give and bequeath to the said Algernine D. Smith, her executors, administrators, and assigns, all my household and kitchen furniture, including all my silverware (though but little), pictures, wearing apparel, and whatever other goods may be, at the time of my decease, in the house (Alexander James Derbyshire) wherein I reside; and also all my carriages, horses, harness, and all the
12 fixtures and articles in my stable, free from all charges and taxes; and my will and desire is that all said goods, chattels and effects bequeathed in this fifth article shall be included in the inventory of my estate at a valuation of one thousand dollars.

Sixth. I give and bequeath unto the Carpenters' Company, of Philadelphia, of which my deceased father was a member, the sum of one thousand dollars (\$1,000), to be paid as soon as practicable after my decease, free from all charges and taxes.

Seventh. I give, devise and bequeath unto my executors hereinbefore named, and the survivors and survivor of them, and the heirs, executors, administrators and assigns of such survivor, all the rest, residue and remainder of my estate, real and personal, of which I may be seized and possessed, and to which I may be in any wise entitled at the time of my decease, and which I have not hereinbefore otherwise given, bequeathed, and disposed of with the appurtenances: to have and to hold the same unto my said executors and the survivors and survivor of them, and the heirs, executors, administrators and assigns of such survivor: In trust, nevertheless, to and for the uses and purposes hereinafter mentioned, that is to say:

(A) In trust, to let, lease, and demise the real estate hereby devised to them, the said executors, to, at and for such persons, terms, rents and sums of money as the said executors may deem proper; and to invest the personal property hereby devised to them and that which they shall otherwise receive, and the proceeds thereof, in some safe and reliable securities, and to collect, recover (Alexander James Derbyshire) and receive the rents, issues, income and profits of the said real and personal estate and property when and as the same shall become due and payable.

(B) And in trust, further, at any time and from time to
13 time, to bargain, sell and absolutely dispose of all or any part
of my said real and personal estate and property, either at
public or private sale, whenever in their discretion they, my said
executors, may deem it proper to do so, and to make, sign, seal, exe-
cute, acknowledge and deliver, all such deed or deeds of conveyance
and instruments of writing as may be necessary to vest or transfer
the said real or personal estate and property so bargained, sold and
disposed of, in or to the purchaser or purchasers thereof in fee
simple, free and discharged from the uses and trusts herein declared
or appointed, and without any liability on the part of such purchaser
or purchasers to look to the application of the purchase money
thereof.

(C) Provided, however, that my said executors shall, and they
are hereby empowered and directed to permit and suffer the said
Algemine D. Smith, during the full term of her natural life or for
so long a time as she may desire to do so, to possess, remain in, and
occupy, as and for her residence, my dwelling house and lot, num-
ber five hundred and ten (510) North Fourth Street, in the city of
Philadelphia; and also to have the possession and use of my stable,
attached to the said lot, for and during the like term or time, free
of all charges for rent, taxes, repairs, or otherwise; and I hereby
direct and empower my said executors to keep the said dwelling
house and stable in good repair and insured from loss or damage by
fire, and to (Alexander James Derbyshire) pay all taxes and assess-
ments upon the same at the cost and expense of my estate, and with-
out any charge or expense to the said Algemine D. Smith during
the time she may choose to occupy and keep possession of said dwell-
ing house and stable as aforesaid; and in case of the loss of or dam-
age to the same by fire, to rebuild or repair the same at the expense
of my estate; and I do hereby direct that my said dwelling house
and lot and stable shall not be sold or leased until after the
14 decease of the said Algemine D. Smith, or until she shall
sooner declare her intention to cease to remain in, occupy, or
possess the same as foresaid.

(D) And in trust further, to invest the proceeds of such sales as
may be made as aforesaid, and any and all moneys which shall come
into the hands of my said executors from time to time and remain
unexpended, in safe and reliable securities and to the best advan-
tage in their judgment, so as to produce income and interest thereon,
and to collect, recover, and receive the income, issues, and profits
thereof, when and as the same shall become due and payable.

(E) And in trust further, and my said executors are hereby di-
rected, to pay to the said Algemine D. Smith, the sum of four thou-
sand dollars (\$4,000) per annum for the period of two years,
commencing from the date of my decease, if she should so long sur-
vive me, to be paid in quarterly payments, the said sum to be at her
absolute disposal without limitation or condition, but for the pur-

pose of enabling her, if she elects to do so, to maintain my family as it may be constituted at the time of my decease; and further, to pay to the said Algemine D. Smith, the sum of three thousand (Alexander James Derbyshire) dollars (\$3,000) per annum, to commence at the expiration of the period of two years from the time of my decease, if she should so long survive me, and to continue to be paid to her in quarterly payments during the full term of her natural life; and the said sums are to be paid to the said Algemine D. Smith upon her own receipt free from all charges and taxes and free from the control, debts, liabilities, or engagements of any husband she may have.

(F) And in trust further, and my said executors are hereby directed to pay to my cousin, Caroline Derbyshire, daughter of my cousin, James A. Derbyshire, now of the State of Indiana, the sum of eight hundred dollars (\$800) per annum, to commence from the date of my decease, and to continue during the whole term of her natural life, the same to be paid to her in quarterly payments upon her own receipt, and to be free from all charges and taxes, and free from the control, debts, liabilities, or engagements of any husband she may have.

(G) And in trust further, and my said executors are hereby directed to pay unto my dear cousin, Eliza Ann Henszey, daughter of my deceased uncle, Thomas Henszey, the sum of six hundred dollars (\$600) per annum, to commence from the date of my decease, and to continue during the full term of her natural life, the same to be paid to her in quarterly payments, free from all charges and taxes.

(H) And in trust further, and my said executors are hereby directed to pay Alexander J. Derbyshire, Junior, son of my said counsins James A. Derbyshire, the sum of one thousand dollars (\$1,000) when he (Alexander James Derbyshire) shall arrive at, and if he shall live, to, the full age of twenty-one years, free from all charges and taxes.

(I) And in trust further, and my said executors are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey, and of the said Alexander J. Derbyshire, Jr., before his arrival at the age of twenty-one years, to convey, assign, transfer, set over and pay unto the contributors to the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said Institution, all the rest, residue and remainder of my estate, real and personal, and of the income, rents, issues, profits, and accumulations thereof which may remain in the hands of my said executors unsold or undisposed of as aforesaid after the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey and Alexander J. Derbyshire, Jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests, and sums of money hereinbefore and hereinafter devised and bequeathed or directed to be paid, and after paying for and discharg-

ing all the charges, taxes, repairs and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management, and settlement of my estate and property as aforesaid and as hereinafter mentioned.

(J) And in trust further, and I do hereby declare my will and intention to be, that all collateral inheritance taxes, and all other taxes, charges, and assessments upon, against or on account of my real and personal estate and property herein or hereby devised or mentioned, shall be paid and discharged (Alexander James Derbyshire) by my executors out of my estate, so that the said several legacies, annuities, bequests, devises and sums of money hereinbefore mentioned shall be paid clear of the said taxes, charges, and assessments; and also that my said executors shall be entitled to charge and receive for their services a commission of three (3) per cent upon all sums of money that may be received and disbursed by them in the management and settlement of my estate; and also that the said several legacies, annuities, bequests, and sums of money hereinbefore directed to be paid, shall be paid out of the rents, income, issues, and profits of my state, so far as the same will suffice, before any part of the capital or principal thereof shall be used for that purpose; and further, that in the event of the depreciation in value or loss of my estate, property, or investments or any part thereof from any cause; to such extent as that all of the annuities, charges, taxes, and sums of money mentioned or directed to be paid in the clauses marked C, E, F, 17 G, and H, respectively, can not be paid in full, that the same shall be paid in full severally and respectively, in rotation by preference or priority in the order above mentioned and marked as aforesaid, and not pro rata or in proportion to the amount of money or property in hand.

And lastly, I do hereby revoke and make null and void all former wills, testaments, devises, legacies, and bequests by me at any time heretofore made, and do declare this only and no other to be my last will and testament (Alexander James Derbyshire) which is written upon eight sheets of paper, to each of which I have subscribed my name.

In witness whereof, I, the said Alexander James Derbyshire, have hereunto set my hand and seal, the ninth day of fourth month. Anno Domini, one thousand eight hundred and seventy-seven (1877).

ALEXANDER JAMES DERBYSHIRE. (Seal)

(Signed, sealed, published and declared by the above-named testator, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as attesting witnesses in his presence and in the presence of each other, on the day and year aforesaid; the words "and hereinafter" having been interlined on the twenty-first line of the sixth page before signing and sealing.

GEO. W. J. BALL,
J. M. HOWARD,
P. B. PRINCE.

Affidavit of defense (No. 5628).

(Filed August 28, 1918.)

1. Ephraim Lederer, the above-named defendant, having been duly affirmed, says that he has a just and full defense to the whole of the plaintiff's claim, as follows:

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Defendant avers that the tax was legally collected, and leaves for the determination of the court the question raised in this paragraph.

10. Admitted.

11. Wherefore, for the reasons set forth above, defendant denies any liability whatever to the plaintiff.

Affirmed and subscribed before me this 28th day of August, A. D. 1918.

(Sgd.)

EPHRAIM LEDERER.

LEO A. LILLY,

Deputy Clerk District Court United States, Eastern District of Pennsylvania.

In the District Court of the United States for the Eastern District of Pennsylvania.

ALEXANDER D. STOCKTON, SOLE SURVIVING
trustee under the will of Alexander J.
Derbyshire, deceased.

v.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL
revenue for the First District of Penn-
sylvania.

September sessions, 1918

No. 5800.

Statement of plaintiff's demand.

(Filed November 16, 1918.)

Plaintiff claims to recover from the defendant the sum of \$24.02, together with interest thereon from the 11th day of June, 1918; all of which is justly due from the defendant to the plaintiff as follows:

Plaintiff is the sole surviving trustee under the will of Alexander Derbyshire, deceased.

Defendant is the United States collector of internal revenue for first district of Pennsylvania.

4. Alexander J. Derbyshire died on the 29th day of March, 1879 having first made and executed his last will and testament, dated the 9th day of fourth month, 1877, and since duly proved and of record in the office of the register of wills for the county of Philadelphia wherein and whereby after making certain specific bequests, he gave devised, and bequeathed the residue of his estate to his executors and trustees, in trust, to pay three certain annuities; and further provided as follows:

20 “(1) And in trust further, and my said executors are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey” (the three annuitants above referred to) “and of the said Alexander J. Derbyshire, jr. before his arrival at the age of twenty-one years, to convey, assign, transfer, set over and pay unto the Contributors to the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said Institution, all the rest, residue, and remainder of my estate, real and personal, and of the income, rents, issues, profits and accumulations thereof which may remain in the hands of my said executors unsold or undisposed of as aforesaid after the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey and Alexander J. Derbyshire, jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests, and sums of money hereinbefore and hereinafter devised and bequeathed or directed to be paid, and after paying for and discharging all the charges, taxes, repairs and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management and settlement of my estate and property as aforesaid and as hereinafter mentioned.”

A copy of said will is hereto annexed, marked Exhibit “A” and made a part hereof.

5. Two of the said annuitants are now deceased; but the third, Caroline Derbyshire Schelling, is still living. The amount of her annuity is \$800 per annum.

6. All of the income, rents, issues, profits, and accumulations of the said estate other than the amount required for said annuities, are by the express provisions of said will, as above set forth, payable
21 unto the contributors of the Pennsylvania Hospital, their successors and assigns. Said contributors to the Pennsylvania Hospital is a purely public charity and the said income is accumulated and held solely for the purposes of a corporation or association organized and operated exclusively for charitable purposes. No part of the net income of said contributors to the Pennsylvania Hospital is for the benefit of any private stockholder or individual.

7. On or before the 11th day of June, 1918, the defendant assessed against the plaintiff as such trustee, an internal revenue tax, described as “income and excess profits tax,” upon the income of the said trust estate for the year 1917, in a single sum aggregating \$6,824.02, without indicating how much thereof was claimed as an income tax and how much thereof as an excess profits tax.

8. Thereafter, under duress and to avoid distraint threatened by defendant, the plaintiff on the 11th day of June, 1918, paid to defendant the said sum of \$6,824.02.

9. No part of said sum was due or payable from the plaintiff as such trustee to defendant with respect to the income of said estate, because, as above set forth, the annuity to the surviving annuitant Caroline Derbyshire Schelling is \$800 per annum and therefore payable clear of income tax, under the statutes of the United States in such case made and provided; and all of said income not paid to said annuitant, is payable after the death of said annuitant, to the contributors to the Pennsylvania Hospital, a purely public charity whose income is exempt from taxation under said statutes

22 10. Due application for the refund of said sum of \$6,824.02 paid as aforesaid was made to the commissioner of internal revenue as required by law, on the 5th day of July, 1918; but the said commissioner on the 5th day of October, 1918, wrongfully rejected plaintiff's said claim.

11. Plaintiff therefore claims to recover from defendant said sum of \$6,824.02, with interest thereon from the date of payment thereof, June 11th, 1918.

PRICHARD, SAUL, BAYARD & EVANS,
Attorneys for Plaintiff.
Per J. W. BAYARD.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } ss.:

ALEXANDER D. STOCKTON, being duly sworn, says that he is the plaintiff in the above-entitled cause and that the facts set forth in the foregoing statement, as the basis of plaintiff's demand, are true.

ALEXANDER D. STOCKTON.

Sworn to and subscribed before me this 14th day of November, 1918.

[SEAL.] RAYMOND M. REMICK,
Notary Public.

My commission expires on the 10th day of March, 1921.

Exhibit "A."

For copy of will (Exhibit "A") see page 10.

23 Affidavit of defense (No. 5800).

(Filed November 30, 1918.)

1. Ephraim Lederer, the above-named defendant, having been duly affirmed, says that he has a just and full defense to the whole of the plaintiff's claim, as follows:

2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.

8. Admitted.

9. Defendant avers that the tax was legally collected, and leaves for the determination of the court the question raised in this paragraph.

10. Admitted that the claim for refund was rejected.

11. Wherefore, for the reasons set forth above, defendant denies any liability whatever to the plaintiff.

(Sgd.)

EPHRAIM LEDERER.

Affirmed and subscribed before me this 25 day of November, 1918.

LEO A. LILLY,

*Deputy Clerk, District Court, United States,
Eastern District of Pennsylvania.*

24

Stipulation.

(Filed February 1, 1920.)

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in the cases be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes.

FRANCIS FISHER KANE,

United States Attorney, Attorney for Plaintiff.

PRICHARD, SAUL, BAYARD & EVANS,

J. W. BAYARD,

Attorney for Defendant.

PHILADELPHIA, PA., *January 28, 1919.*

25 In the District Court of the United States for the Eastern District of Pennsylvania.

ALEXANDER D. STOCKTON, SOLE SURVIVING
trustee under the will of Alexander J.
Derbyshire, deceased,

v.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL
revenue for the First District of Pennsyl-
vania.

June sessions, 1918.

No. 5628.

ALEXANDER D. STOCKTON, SOLE SURVIVING
trustee under the will of Alexander J.
Derbyshire, deceased,

v.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL
revenue for the First District of Pennsyl-
vania.

June sessions, 1918.

No. 5800.

Philadelphia, Pa., Wednesday, March 26, 1919.

Before Hon. O. B. Dickinson, *J.*

Present: Prichard, Saul, Bayard & Evans, by Ralph B. Evans, Esq., for plaintiff. Robert J. Sterrett, Esq., for defendant.

Plaintiff's evidence.

June sessions, 1918. No. 5628.

Mr. EVANS. I offer in evidence paragraphs 2, 3, 4, 5, 6, 7, and 8 of the statement of claim, which are admitted by the affidavit of defense.

26 Said paragraphs of the statement of claim are as follows:

"2. Plaintiff is the sole surviving trustee under the will of Alexander J. Derbyshire, deceased.

3. Defendant is the United States collector of internal revenue for the first district of Pennsylvania.

4. Alexander J. Derbyshire died on the 29th day of March, 1879, having first made and executed his last will and testament, dated the 9th day of fourth month, 1877, and since duly proved and of record in the office of the register of wills for the county of Philadelphia, wherein and whereby after making certain specific bequests, he gave, devised, and bequeathed the residue of his estate to his executors and trustees, in trust, to pay three certain annuities; and further provided as follows:

'(1) And in trust further, and my said executors, are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey' (the three annuitants above referred to) 'and of the said Alexander J. Derbyshire, jr., before his arrival at the age of twenty-one years, to convey, assign, transfer, set over, and pay unto the contributors to the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said institution, all the rest, residue, and remainder of my estate, real and personal, and of the income, rents, issues, profits, and accumulations thereof which may remain in the hands of my said executors unsold or undisposed of as aforesaid after the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey, and Alexander J. Derbyshire, jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests, and sums of money hereinbefore and hereinafter devised and bequeathed or directed to be paid, and after paying for and discharging all the charges, taxes, repairs, and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management, and settlement of my estate and property as aforesaid and as hereinafter mentioned.'

A copy of said will is hereto annexed, marked Exhibit 'A,' and made a part hereof.

5. Two of the said annuitants are now deceased; but the third, Caroline Derbyshire Schelling, is still living. The amount of her annuity is \$800 per annum.

6. All of the income, rents, issues, profits, and accumulations of the said estate other than the amount required for said annuities, are, the express provisions of said will, as above set forth, payable

unto the Contributors of the Pennsylvania Hospital, their successors and assigns. Said Contributors to the Pennsylvania Hospital is a purely public charity and the said income is accumulated and held solely for the purposes of a corporation or association organized and operated exclusively for charitable purposes. No part of the net income of said Contributors to the Pennsylvania Hospital is for the benefit of any private stockholder or individual.

7. On the 26th day of June, 1917, the defendant assessed plaintiff as such trustee an internal revenue tax upon the income of said trust estate, as follows:

Upon the income for the year 1913-----	\$666.58
Upon the income for the year 1914-----	896.42
Upon the income for the year 1915-----	992.23
Upon the income for the year 1916-----	1,718.19

Making a total of-----\$4,273.42

8. Thereafter, under duress and to avoid distraint threatened by defendant, the plaintiff on the 3rd day of July, 1917, paid to defendant the said sum of \$4,273.42."

28 (It is stipulated that claim for refund of said taxes, amounting to \$4,273.42, was duly made to the commissioner of internal revenue, and rejected by him.)

(Mr. Evans also offered in evidence copy of the will of Alexander J. Derbyshire and the letters testamentary.)

The will and letters testamentary are as follows:

COMMONWEALTH OF PENNSYLVANIA,

City and County of Philadelphia, ss:

By the tenor of these presents, I, Jesse W. Neal, register for the probate of wills and granting letters of administration in and [SEAL.] for the city and county of Philadelphia, in the Commonwealth of Pennsylvania,

Do make known to all men, that on the fourth day of April, A. D. 1879, at Philadelphia, before me was proved and approved, the last will and testament of Alexander James Derbyshire, deceased, (a true copy whereof is to these presents annexed), having whilst he lived, and at the time of his death, divers goods, chattels, rights and credits, within the said Commonwealth, by reason whereof the approbation and insinuation of said last will and testament, and the committing administration of all and singular the goods, chattels, rights and credits, which were of the said deceased; and also the auditing the accounts, calculations and reckonings of the said administration, and absolute care of the same, to me are manifestly known to belong; and that administration of all and singular the goods, chattels, rights and credits of said deceased any way concerning his last will and testament, was committed to Jno. W. Biddle, Joseph G. Henszey, Danl. W. Slack, and Alex. D. Stockton, executors in the said testa-

29 ment named, they having first been duly qualified well and truly to administer the goods, chattels, rights and credits of

the deceased, and make a true and perfect inventory thereof and exhibit the same into the register's office of Philadelphia, on or before the 4th day of May next, and to render a just and true account, calculation and reckoning of the said administration, on or before the 4th day of April, one thousand eight hundred and eighty, or when lawfully required; and also to diligently and faithfully regard, and well and truly comply with the provisions of the act relating to collateral inheritance.

In testimony whereof, I hereunto set my hand and seal of office, at Philadelphia, this 4th day of April, in the year of our Lord, one thousand eight hundred and seventy-nine.

(Signed)

H. L. KEYSER,
Pro Register.

Will.

I, Alexander James Derbyshire, merchant of the city of Philadelphia, in the State of Pennsylvania, U. S. of America, being of sound and disposing mind and memory, do make and publish this my last will and testament, in manner and form following, that is to say:

First. I nominate and appoint my friend John W. Biddle, son of my esteemed friend and old school-mate William Biddle; my cousin Joseph G. Henszey, son of my deceased uncle Samuel C. Henszey; Daniel W. Slack, who was in my service for more than twenty-five years; and my cousin Alexander D. Stockton, now a member of my family, to be the executors of this my last will and testament.

Second. I charge my executors to collect, recover and receive all the debts, rents, income, dividends, and sums of money, ³⁰ property and effects whatsoever that may be due, owing or belonging to me, whether arising from or out of real or personal estate or otherwise; but I authorize and desire my executors to continue the present investments of my personal estate so long as they may consider it prudent to do so without risk of loss.

Third. I direct my executors to settle, pay and discharge all my just debts and funeral expenses as soon as practicable after my decease.

Fourth. I give and bequeath to Algemine D. Smith (who was tenderly reared by my deceased sisters from her childhood) the sum of two thousand dollars (\$2,000) absolutely, to be paid to her as soon as practicable after my decease, free from all charges and taxes.

Fifth. I give and bequeath to the said Algemine D. Smith, her executors, administrators and assigns, all my household and kitchen furniture, including all my silverware (though but little), pictures, wearing apparel, and whatever other goods may be, at the time of my decease, in the house (Alexander James Derbyshire) wherein I reside; and also all my carriages, horses, harness, and all the fixtures and articles in my stable, free from all charges and taxes; and my will and desire is that all said goods, chattels and effects bequeathed in this fifth article shall be included in the inventory of my estate at a valuation of one thousand dollars.

Sixth. I give and bequeath unto the Carpenters' Company of Philadelphia, of which my deceased father was a member, the sum of one thousand dollars (\$1,000), to be paid as soon as practicable after my decease, free from all charges and taxes.

Seventh. I give, devise and bequeath unto my executors hereinbefore named, and the survivors and survivor of them, and the heirs, executors, administrators and assigns of such survivor, all the
31 rest, residue and remainder of my estate, real and personal, of which I may be seized and possessed, and to which I may be in any wise entitled at the time of my decease, and which I have not hereinbefore otherwise given, bequeathed and disposed of which the appurtenances, to have and to hold the same unto my said executors, and the survivors and survivor of them, and the heirs, executors, administrators and assigns of such survivor, in trust, nevertheless, to and for the uses and purposes hereinafter mentioned, that is to say:

(A) In trust, to let, lease and demise the real estate hereby devised to them, the said executors, to, at and for such persons, terms, rents, and sums of money as the said executors may deem proper; and to invest the personal property hereby devised to them and that which they shall otherwise receive, and the proceeds thereof, in some safe and reliable securities, and to collect, recover (Alexander James Derbyshire) and receive the rents, issues, income, and profits of the said real and personal estate and property when and as the same shall become due and payable.

(B) And in trust, further, at any time and from time to time, to bargain, sell, and absolutely dispose of all or any part of my said real and personal estate and property, either at public or private sale, whenever in their discretion they, my said executors, may deem it proper to do so, and to make, sign, seal, execute, acknowledge and deliver, all such deed or deeds of conveyance and instruments of writing as may be necessary to vest or transfer the said real or personal estate and property so bargained, sold, and disposed of, in or to the purchaser or purchasers thereof in fee simple, free and discharged from the uses and trusts herein declared or appointed, and without any liability on the part of such purchaser or purchasers to look to the application of the purchase money thereof.

32 (C) Provided, however, that my said executors shall, and they are hereby empowered and directed to permit and suffer the said Algemine D. Smith, during the full term of her natural life or for so long a time as she may desire to do so, to possess, remain in, and occupy, as and for her residence, my dwelling house and lot number five hundred and ten (510) North Fourth Street, in the city of Philadelphia; and also to have the possession and use of my stable, attached to the said lot, for and during the like term or time, free of all charges for rent, taxes, repairs, or otherwise; and I hereby direct and empower my said executors to keep the said dwelling house and stable in good repair and insured from loss or damage, by fire, and to (Alexander James Derbyshire) pay all taxes

and assessments upon the same at the cost and expense of my estate, and without any charge or expense to the said Algemine D. Smith during the time she may choose to occupy and keep possession of said dwelling house and stable as aforesaid; and in case of the loss of or damage to the same by fire, to rebuild or repair the same at the expense of my estate; and I do hereby direct that my said dwelling house and lot and stable shall not be sold or leased until after the decease of the said Algemine D. Smith, or until she shall sooner declare her intention to cease to remain in, occupy, or possess the same as aforesaid.

(D) And in trust further, to invest the proceeds of such sales as may be made as aforesaid, and any and all moneys which shall come into the hands of my said executors from time to time and remain unexpended, in safe and reliable securities and to the best advantage in their judgment, so as to produce income and interest thereon, and to collect, recover, and receive the income, issues, and profits thereof when and as the same shall become due and payable.

33 (E) And in trust further, and my said executors are hereby directed to pay to the said Algemine D. Smith, the sum of four thousand dollars (\$4,000) per annum for the period of two years, commencing from the date of my decease, if she should so long survive me, to be paid in quarterly payments, the said sum to be at her absolute disposal without limitation or condition, but for the purpose of enabling her, if she elects to do so, to maintain my family as it may be constituted at the time of my decease; and further, to pay to the said Algemine D. Smith, the sum of three thousand (Alexander James Derbyshire) dollars (\$3,000) per annum, to commence at the expiration of the period of two years from the time of my decease, if she should so long survive me, and to continue to be paid to her in quarterly payments during the full term of her natural life; and the said sums are to be paid to the said Algemine D. Smith upon her own receipt, free from all charges and taxes and free from the control, debts, liabilities or engagements of any husband she may have.

(F) And in trust further, and my said executors are hereby directed to pay to my cousin, Caroline Derbyshire, daughter of my cousin, James A. Derbyshire, now of the State of Indiana, the sum of eight hundred dollars (\$800) per annum, to commence from the date of my decease, and to continue during the whole term of her natural life, the same to be paid to her in quarterly payments upon her own receipt, and to be free from all charges and taxes, and free from the control, debts, liabilities or engagements of any husband she may have.

(G) And in trust further, and my said executors are hereby directed to pay unto my dear cousin, Eliza Ann Henszey, daughter of my deceased uncle, Thomas Henszey, the sum of six hundred dollars (\$600) per annum, to commence from the date of my
34 decease, and to continue during the full term of her natural

life, the same to be paid to her in quarterly payments, free from all charges and taxes.

(H) And in trust further, and my said executors are hereby directed to pay to Alexander J. Derbyshire, Junior, son of my said cousin, James A. Derbyshire, the sum of one thousand dollars (\$1,000) when he (Alexander James Derbyshire) shall arrive at, and if he shall live to, the full age of twenty-one years, free from all charges and taxes.

(I) And in trust further, and my said executors are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey, and of the said Alexander J. Derbyshire, Jr., before his arrival at the age of twenty-one years, to convey, assign, transfer, set over and pay unto the Contributors to the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said Institution, all the rest, residue and remainder of my estate, real and personal, and of the income, rents, issues, profits and accumulations thereof which may remain in the hands of my said Executors unsold or undisposed of as aforesaid after the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey and Alexander J. Derbyshire, Jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests and sums of money hereinbefore and hereinafter devised and bequeathed or directed to be paid, and after paying for and discharging all the charges, taxes, repairs and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management and settlement of my estate and property as aforesaid and as hereinafter mentioned.

(J) And in trust further, and I do hereby declare my will 35 and intention to be, that all collateral inheritance taxes, and all other taxes, charges and assessments upon, against or on account of my real and personal estate and property herein or hereby devised or mentioned, shall be paid and discharged (Alexander James Derbyshire) by my executors out of my estate, so that the said several legacies, annuities, bequests, devises and sums of money hereinbefore mentioned shall be paid clear of the said taxes, charges and assessments; and also that my said executors shall be entitled to charge and receive for their services a commission of three (3) per cent. upon all sums of money that may be received and disbursed by them in the management and settlement of my estate; and also that the said several legacies, annuities, bequests and sums of money hereinbefore directed to be paid, shall be paid out of the rents, income, issues and profits of my estate, so far as the same will suffice, before any part of the capital or principal thereof shall be used for that purpose; and further, that in the event of the depreciation in value or loss of my estate, property or investments or any part thereof from any cause; to such extent as that all of the annuities, charges, taxes and sums of money mentioned or directed to be paid in the

clauses marked C, E, F, G and H respectively, cannot be paid in full, that the same shall be paid in full severally and respectively in rotation by preference or priority in the order above mentioned and marked, as aforesaid, and not pro rata or in proportion to the amount of money or property in hand.

And lastly, I do hereby revoke and make null and void all former wills, testaments, devises, legacies and bequests by me at any time heretofore made, and to declare this only and no other to be my last will and testament (Alexander James Derbyshire), which is written upon eight sheets of paper, to each of which I have subscribed my name.

36 In witness whereof, I, the said Alexander James Derbyshire, have hereunto set my hand and seal, the ninth day of Fourth month, Anno Domini, one thousand eight hundred and seventy-seven (1877).

ALEXANDER JAMES DERBYSHIRE. [SEAL.]

Signed, sealed, published and declared by the above-named testator, as and for his last will and testament, in the presence of us, who have *have* hereunto subscribed our names as attesting witnesses in his presence and in the presence of each other, on the day and year aforesaid; the words "and hereinafter" having been interlined on the twenty-first line of the sixth page before signing and sealing.

GEO. W. J. BALL,
J. M. HOWARD,
P. B. PRINCE.

Geo. W. J. Ball, J. M. Howard, and P. B. Prince, the subscribing witnesses, sworn April 4th, 1879.

H. L. KEYSER,
Dep. Register.

Jno. W. Biddle, Joseph G. Henszey, Danl. W. Slack, Alex. D. Stockton, the executors within named, qualified April 4th, 1879, and letters testamentary granted unto them. The said testator died March 29th, A. D. 1879, at 2½ A. M.

H. L. KEYSER,
Dep. Register.

June Sessions, 1918. No. 5800.

MR. EVANS. I offer in evidence paragraphs 2, 3, 4, 5, 6, 7, and 8 of the statement of claim, which are admitted by the affidavit of defense.

37 The said paragraphs of the statement of claim are as follows:
"2. Plaintiff is the sole surviving trustee under the will of Alexander J. Derbyshire, deceased.

3. Defendant is the United States collector of internal revenue for the first district of Pennsylvania.

4. Alexander J. Derbyshire died on the 29th day of March, 1879, having first made and executed his last will and testament, dated

the 9th day of fourth month, 1877, and since duly proved and of record in the office of the register of wills for the county of Philadelphia, wherein and whereby after making certain specific bequests he gave, devised, and bequeathed the residue of his estate to his executors and trustees, in trust, to pay three certain annuities; and further provided as follows:

'(1) And in trust further, and my said executors are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey' (the three annuitants above referred to) 'and of the said Alexander J. Derbyshire, jr., before his arrival at the age of twenty-one years, to convey, assign, transfer, set over, and pay unto the Contributors to the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said institution, all the rest, residue, and remainder of my estate, real and personal, and of the income, rents, issues, profits, and accumulations thereof which may remain in the hands of my said executors unsold or undisposed of as aforesaid after the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey, and Alexander J. Derbyshire, jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests, and sums of money hereinbefore and hereinafter devised and bequeathed or directed to be paid, and after paying for
38 and discharging all the charges, taxes, repairs, and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management, and settlement of my estate and property as aforesaid and as hereinafter mentioned.'

A copy of said will is hereto annexed, marked Exhibit 'A' and made a part hereof.

5. Two of the said annuitants are now deceased; but the third, Caroline Derbyshire Schelling, is still living. The amount of her annuity is \$800 per annum.

6. All of the income, rents, issues, profits, and accumulations of the said estate other than the amount required for said annuities, are, by the express provision of said will, as above set forth, payable unto the contributors of the Pennsylvania Hospital, their successors, and assigns. Said Contributors to the Pennsylvania Hospital is a purely public charity and the said income is accumulated and held solely for the purposes of a corporation or association organized and operated exclusively for charitable purposes. No part of the net income of said contributors to the Pennsylvania Hospital is for the benefit of any private stockholder or individual.

7. On or before the 11th day of June, 1918, the defendant assessed against the plaintiff as such trustee, an internal revenue tax, described as 'income and excess profit tax,' upon the income of the said trust estate for the year 1917, in a single sum aggregating \$6,824.02, without indicating how much thereof was claimed as an income tax and how much thereof as an excess profits tax.

8. Thereafter, under duress and to avoid distraint threatened by defendant, the plaintiff on the 11th day of June, 1918, paid to defendant the said sum of \$6,824.02."

39 (It is stipulated that claim for refund of said taxes, amounting to \$6,824.02, was duly made to the commissioner of internal revenue, and rejected by him.)

(Mr. Evans also offered in evidence copy of the will of Alexander J. Derbyshire and the letters testamentary.)

Evidence applicable to both cases.

Alexander D. Stockton, having been duly affirmed, was examined and testified as follows:

By Mr. EVANS:

Q. Where do you live?

A. At the present time I live at 1508 Green Street, Philadelphia.

Q. You are the sole surviving trustee under the will of Alexander James Derbyshire?

A. Yes, sir.

Q. And you were one of the executors?

A. Yes, sir; appointed under the will.

Q. Was an executors' account filed?

A. When do you mean?

Q. At any time after Mr. Derbyshire's death, did the executors file their account in the Orphans' Court?

A. Yes.

Q. Have all of the legacies given by the will been paid?

A. Yes, sir.

By THE COURT:

Q. Have there ever been any trustees' accounts filed, income accounts?

A. We file an account in the Orphans' Court every three years.

Q. As I understand it, you are both executor and trustee?

40 A. Yes.

Q. With others, and you are now the sole survivor of the trustees and the executors?

A. Yes, sir.

Q. Do you have in mind the distinction—I mention this because no one other than a lawyer would be likely to have it in mind, although you may have it—do you have in mind the distinction between an executor's account and a trustee's account, where the executor and the trustee are the same person?

A. I cannot say that I have.

MR. EVANS: I understand that it has been their practice to file triennial accounts as trustees.

By Mr. EVANS:

Q. That is correct, is it not, you have filed trustees' accounts every three years?

A. Every three years we file an account.

THE COURT: What I have in mind is that if such accounts have been filed, which would include an income account, why does not that give you everything you want, so far as the fact situation is concerned?

THE WITNESS: The income is all put down in the account separately from other things, of course.

THE COURT: Yes, of course; that is what I meant.

MR. EVANS: It would, but I think it is going to be quicker to prove the facts we need by Mr. Stockton.

THE COURT: You go ahead and do it your own way. It just occurred to me that that might help you to shorten matters.

By MR. EVANS:

Q. By his will Mr. Derbyshire directed the payment of
41 annuities to Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey. Is Algemine D. Smith living?

A. No; she died in 1903.

Q. And Caroline Derbyshire; when did she die?

A. She is not dead at all. She is Caroline Schelling.

Q. She is still living?

A. Yes.

Q. How old is she?

A. Fifty-nine.

Q. Eliza Ann Henszey; is she still living?

A. Oh, no; she died—I do not know the date, but she died in 1889 or somewhere around the 80's.

Q. Under the terms of the will, you are now paying to Caroline Derbyshire, who is now Caroline Schelling, her annuity of \$800 a year.

A. Yes, sir.

Q. Roughly, what does the annual income from the estate amount to?

A. Of course, it changes every year, because it is increasing all the time. I mentioned to you this morning that I thought it would amount to pretty nearly \$90,000, but I did not notice I had a balance taken over from last year at the head of my column. I told you I thought it would be about \$90,000, but taking out that balance, which was carried over, it will only be about \$85,000 or \$86,000.

Q. The point is, it is considerably more than enough to pay the annuity to Mrs. Schelling?

A. Oh, yes.

Q. What, in point of fact, do you do with the balance of the net income after payment of Mrs. Schelling's annuity?

A. I loan it to the Pennsylvania Hospital, to the Contributors of the Pennsylvania Hospital.

Q. Under what kind of an arrangement?

42 A. Under a blanket mortgage of \$500,000, bond and mortgage, on the Pennsylvania Hospital property at Eighth and

Spruce, Eighth and Pine Streets, and this mortgage and bond was drawn by John G. Johnson.

By THE COURT:

That means that as the income accumulates in your hands, you reinvest it by making that mortgage loan?

A. Yes.

By Mr. EVANS:

Q. How long have you been doing that?

A. I think we commenced this arrangement January, 1914.

Q. And from time to time, as you have an accumulation of income on hand, you turn it over to the Pennsylvania Hospital, taking from them their bond secured by this blanket mortgage which you already hold?

A. Yes, sir.

Q. And they pay interest on that at the rate of 4 per cent?

A. 4.4.

Cross-examination by Mr. STERRETT:

Q. Alexander J. Derbyshire, jr., named in the will, is he living?

A. Yes, sir.

Q. How old is he?

A. I could not tell you that?

Q. About?

A. I could tell you if I had my records, book records.

Q. Is he over 21?

A. Yes; he has two children over 21. He was here at the time that Mr. Alexander J. Derbyshire died, and I have forgotten just the year, maybe a year or year and a half after his death, he went West.

By THE COURT:

Q. He is a man of middle age?

A. Yes. He went West and married and he has two sons. One of them went into the war and the other went into the shipbuilding business, I believe, so he must be 45 or 50 years of age anyhow.

Plaintiff rests.

The defendant offered no evidence.

Testimony closed.

Plaintiff's requests for findings of fact.

(Filed November 25, 1919.)

The learned trial judge is respectfully requested to make the following findings of fact:

Plaintiff is the sole surviving trustee under the will of Alexander Derbyshire, deceased.

Defendant is United States collector of internal revenue for the district of Pennsylvania.

3. The said Alexander J. Derbyshire died on the 29th day March, 1879, having first made and executed his last will and testament dated the 9th day of the fourth month 1877, and duly proved and of record in the office of the register of wills for the county of Philadelphia.

44 4. By his will, after making certain specific bequests devised and bequeathed the residue of his estate in trust to three certain annuities, and further provided as follows:

"(1) And in trust further, and my said executors are hereby directed, after the decease of the said Algemine D. Smith, Caroline Derbyshire, and Eliza Ann Henszey, and of the said Alexander Derbyshire, jr., before his arrival at the age of twenty-one years, to convey, assign, transfer, set over, and pay unto the contributors of the Pennsylvania Hospital, their successors and assigns, for the charitable uses of the said institution, all the rest, residue, and remainder of my estate, real and personal, and of the income, rents, issues, profits, and accumulations thereof which may remain in the hands of my said executors unsold or undisposed of as aforesaid at the decease of the said Algemine D. Smith, Caroline Derbyshire, Eliza Ann Henszey, and Alexander J. Derbyshire, jr., as aforesaid, and after paying and discharging all my debts and funeral expenses, and all the annuities, legacies, bequests, and sums of money heretofore and hereinafter devised and bequeathed or directed to be paid, and after paying for and discharging all the charges, taxes, repairs, and insurance upon all my estate and property, real and personal, and all the charges and expenses incident to the sale, management, and settlement of my estate and property as aforesaid and as hereinafter mentioned."

5. Two of said annuitants are now deceased; but the third, Caroline Derbyshire (now Schelling), is still living and entitled to an annuity of \$800 per annum.

6. Alexander J. Derbyshire, jr., has attained the age of twenty-one years and is still living.

7. All the income and accumulations of said estate, other than the amount required for said annuity, have been, in accordance with the terms of the will, accumulated pending the death of the last surviving annuitant.

8. The "Contributors to the Pennsylvania Hospital" is a pure public charity and no part of the net income of said corporation is for the benefit of any private stockholder or individual.

9. On June 26th, 1917, the defendant, as collector, assessed against the plaintiff, as trustee of said estate, an internal revenue tax upon the income thereof as follows:

Upon the income for the year 1913-----	666.58;
Upon the income for the year 1914-----	896.42;
Upon the income for the year 1915-----	992.23;
Upon the income for the year 1916-----	1,718.19;

Aggregating ----- \$4,273.42.

10. Said sum was paid by the plaintiff to the defendant under duress and to avoid distraint on July 3rd, 1917. Claim for the refund thereof was duly made to the Commissioner of Internal Revenue and rejected by him.

11. On the 11th day of June, 1918, the defendant as such collector assessed against the plaintiff as such trustee an income and excess profits tax upon the income of said trust estate for the year 1917, aggregating \$6,842.02.

12. Under duress and to avoid distraint the plaintiff, on the 11th day of June, 1918, paid said sum to the defendant.

13. A claim for the refund of said sum was duly made to the Commissioner of Internal Revenue and rejected by him.

14. The first suit, brought to No. 5628, June sessions, 1918, was for the recovery of the tax assessed with regard to the years 1913, 1914, 1915, and 1916. The second suit, No. 5800, was brought for the recovery of the amount of the tax for 1917.

15. The taxes for the years 1913, 1914, and 1915 were levied under the revenue act of 1913. The tax for the year 1916 was levied under the revenue act of 1916. The tax for the year 1917 was levied under the revenue act of 1916 as amended by the war revenue act of 1917.

Plaintiff's request for findings of law.

(Filed November 25, 1919.)

The learned trial judge is respectfully requested to make the following findings of law:

16. Under the will of Alexander J. Derbyshire, deceased, title to the residue of his estate, including all income and accumulations of income thereon is vested in the contributors to the Pennsylvania Hospital; but said corporation is not entitled to the possession thereof until the death of the surviving annuitants.

17. The devise to said contributors to the Pennsylvania Hospital is a devise to a corporation created for purely charitable purposes.

18. A devise of income or principal for such a charity, whether vested in possession of the said charity or not, is not subject to taxation under the revenue act of 1913.

19. A devise of income or principal for such a charity, whether vested in possession of said charity or not, is not subject to taxation under the revenue act of 1916 or the war revenue act of 1917.

20. The plaintiff is therefore entitled to recover from the defendant the amounts paid by him as taxes upon the income of said estate, together with interest thereon from the date of payment, viz, the sum of \$4,273.42, with interest from the 3rd day of July, 1917, and the sum of \$6,824.32, with interest from the 11th day of June, 1918.

PRICHARD, SAUL, BAYARD & EVANS,

For Plaintiff.

Per J. W. BAYARD.

Defendant's requests for conclusions of law.

(Filed November 25, 1919.)

The learned trial judge is respectfully requested to make the following conclusions of law:

1. The income upon which the tax levied is not now income of the contributors to the Pennsylvania Hospital, but is income of the trust under the will of Alexander J. Derbyshire.
2. The income of the said trust fund has not been "received" by the Pennsylvania Hospital, within the meaning of the exempt income clauses of the acts under which the taxes were assessed.
3. The income upon which the taxes were assessed is not exempt under any of the exempt income clauses set forth in the revenue acts under which the taxes were assessed.
4. The said taxes were legally collected.

48

Findings of fact.

(Filed November 25, 1919.)

1. The income of the trust fund upon which the tax was assessed is being accumulated under the terms of the will of Alexander J. Derbyshire.
2. Under the terms of the said will as construed by the Supreme Court of Pennsylvania the corpus of the trust with its accumulation can not be paid over to the contributors of the Pennsylvania Hospital until after the death of all of the life tenants, one of whom is still living, and not until all other claims against the estate, including the annuities, have been satisfied. *Biddle's Appeal*, 99 Pa. 519.
3. The said trust is active during the life of the annuitants.

FRANCIS FISHER KANE,

United States Attorney.

PHILADELPHIA, PA., December 5, 1919.

Opinion.

Sur rule for judgment for want of a sufficient affidavit of defense.

DICKINSON, J.

As precisely the same questions of fact and of law arise in each of the above cases, we dispose of them in one opinion. The findings of fact and the conclusions of law accompanying this opinion are to be taken as found separately in each case respectively.

The broad question discussed in this case involves an inquiry into the meanings of the acts of Congress taxing incomes. The particular income is that accruing to an unsettled decedent's estate. The

49 line of thought pointed out to us by counsel for the United States as we grasp the thought and are able to follow the line is, roughly stated, this:

In defining the persons whose incomes are made subject to the tax Congress created a person whose entity may be recognized through the use of the descriptive phrase of decedent's estates. The thought may be readily grasped by calling to mind one of the very numerous situations created out of the fact that some one has died seized and possessed of property, the possession and legal title of which passes to his representatives and is held by them for an indefinite time. During this time income accrues and is received. The phrase commonly in use to describe this situation is intelligible and sufficiently expressive in itself. It is "income of the estate" as distinguished from the person or persons to whom it ultimately goes. If this income is visually traced as issuing out of the corpus of the estate and flowing into the hands of the legal representatives of the testator or other decedent and then being distributed in whole or in part after diminution and division, if there be any, to the person or persons to whom it ultimately goes, the distinction between the income of the estate and the income of the beneficiaries under the will or other ultimate recipients is brought to light with satisfactory clearness.

The estate with which we are concerned is that of a testator who had charged his estate with certain annuities, or what were practically the equivalent of annuities, and had given the residue to a charity. More accurately speaking, he had bequeathed and devised his whole estate to his executors qua trustees in trust to invest and keep invested and to pay the annuities, and after the coming of age of one of them and death of the survivor of the others pay over the corpus of the estate, together with the accumulated income, to the charity.

50 Applying the doctrine which counsel for the United States asks to have applied, as above outlined, a tax has been assessed upon the income as it has accrued to the trustees.

In order to complete the statement of facts, although the bearing of these features upon the question before us is not seen, it may be added that application was made to the court having jurisdiction of the estate to distribute to the residuary cestui que trust the balance of the estate after making provision for the assurance of the payment of the annuities and their release. This was upon the practical ground that the ownership of the corpus of the estate and the excess income over and above the payment of the annuities vested in the charity. Distribution was refused by the court. Resort was then had to the practical expedient of the trustee investing the funds of the estate in the form of a loan to the institution representing the charity, upon which loan the charity paid an interest sufficient to take care of the administrative charges and the payment of the annuities. The argument of counsel for the United States, concisely and perhaps inadequately stated, is that the estate being an entity or person

having an income within the meaning of the tax laws, this income is taxable as such notwithstanding the fact that it ultimately goes to the charity. The thought upon which the argument is based is supported by the statement that notwithstanding the fact that the estate is large and the income therefrom many times the sum required to meet the annuities, there is no legal certainty that anything will go to the charity. The income as income belonging to the estate is taxable under the provisions of the taxing statute, and is exempt only so far as it goes to the charity. Therefore, if it does not go to charity there is no ground of exemption, and as it can not now be determined with legal certainty that it will go to the charity it remains taxable.

51 There are at least two obstacles in the way of the acceptance of this argument as sound. One is that there are two grounds of exemption from taxation. A part of the income is exempt because of the exemption in favor of charity. The other part is exempt because it is below in amount the taxable limit. The two take in the whole income, and it is difficult to escape the conclusion that if the whole income is exempt none of it is taxable. The other obstacle is really the same viewed from a different standpoint. It is that this income is not the income of the estate, but of the parties to whom it is given. The legal representatives of the testator are nothing more than the reservoir and conduit pipe through which the income reaches the beneficiaries of the testator's bounty. If that income is cut off so that it does not arise or is lost in the hands of the trustees, the loss is the loss of the beneficiaries. This is nothing more than the emphatic statement that the income which the United States is proposing to tax is their income. Moreover, it may be stated in addition that the fact theory upon which counsel for the United States base their argument is wholly fanciful and artificial. Practically speaking, there is a surplus of income which goes to charity, so that the whole fabric of the argument is based upon a legal figment, and to recur to the thought already expressed as no part of the income is taxable if it is the income of the beneficiaries, we do not see how the fact that the charitable beneficiary may not receive its share in any way affects the question.

We have dealt with the case as to its facts on the basis of the corpus of the residuary estate together with the accumulations of income going under the will to the charity. Of course, if there were here an intestacy as to the whole or any part of the estate an entirely different question would arise, because the income which is claimed to be taxable would not be within the exception to the act. We 52 have viewed the question of intestacy as a closed question, for the reason that this will has been construed by the State courts, and the finding made thereon fixes the status of all possible claimants. As a consequence we must perforce accept this finding inasmuch as a finding by this court that any portion of the estate, either corpus or income, passed to distributees under the intestate laws would be the

finding of something which does not exist and which legally can not possibly come into existence. As a further consequence we have not taken up the subject of intestacy but accept the ruling made that the decedent did not die intestate as to any part of his estate.

It may be conceded that the income from this estate is within the general taxing clause of the act of Congress, because all persons who receive income which ultimately goes to another are required to withhold out of the income a sum equivalent to the normal income tax and render a return thereof, etc. It is to be observed, however, that the income out of which this tax sum is to be withheld is the income of some one who is subject to the tax, and sub clause (a) of clause G provides that income moneys which go to charity and other named institutions of like general character are not within the taxing clause of the act. This statement is made with respect to the provisions of the taxing act of 1913, assuming it to include the income from unsettled decedent's estates which were included by the act of 1916.

The act of 1917, so far as we have been able to discover, does not change the situation. The language employed in the act of 1916, which makes clear the inclusion of incomes from decedents' estates as taxable, is open to a construction which would include the income which is derived from the assets of this estate, but section 11 (a) of the same act specifically provides that income which belongs
53 to a charitable institution shall not be subject to the tax. The part of the income which goes to the sole remaining annuitant is not taxable because of the provision which is in every one of the acts declaring incomes up to a certain amount not to be taxable under the act.

We are therefore of opinion that no part of the income from this estate is subject to the tax, and that the plaintiff is entitled to recover judgment for the sum set forth in the pleadings.

We understand there is no controversy over the amount for which judgment should be rendered, and the plaintiff may enter formal judgment for the sum demanded in each case.

We accompany this opinion with findings of fact and conclusions of law, in accordance with the requests submitted by plaintiff, as follows:

Findings of fact.

The facts are found as requested in requests of plaintiff 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

Conclusions of law.

We find and state conclusions of law in accordance with the requests of the plaintiff, as follows:

Requests 16, 17, 18 and 19 are found as requested.

The conclusion with respect to Request 20 is that judgment may be entered in each of the cases before us for such sum as counsel

may agree to be the correct sum in each case. We retain jurisdiction of the causes to find and determine the amounts for which judgment may be entered in the event that counsel fail to so agree.

Defendant's requests for conclusions of law are answered as follows:

Requests 1, 2, 3 and 4 are denied.

Requests for findings of fact are answered as follows:

1. Finding 1 is made as requested, in the respect that the income referred to is income derived from the assets of the estate of the decedent pending its administration and final distribution. The income and corpus of this estate is distributable in accordance with the will of the testator, Alexander J. Derbyshire.

2. So far as finding 2 is of a question of fact, it is found that the law of the distribution of this estate was declared by the Supreme Court of the State of Pennsylvania in Biddle's Appeal, 99 Pa. 519, to be that the corpus of the estate was not distributable in the life time of the annuitants.

3. So far as finding 3 is one of fact, it is that the law of this case to be that the corpus of the estate was not distributable in the life of the annuitants in so far as that the corpus of the estate is not distributable until after the death of the last annuitant.

Præcipe for judgment (No. 5628).

(Filed December 29, 1919.)

The clerk will enter judgment for the plaintiff upon a rule for judgment for want of a sufficient affidavit of defense in the above-entitled cause, in accordance with the opinion of the court filed upon said rule, and will assess the damages as follows:

Principal of claim-----	\$4,273.42
Interest thereon from the 3d day of July, 1917, to December 29th, 1919-----	638.16

Total amount of judgment-----	\$4,911.58
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PRICHARD, SAUL, BAYARD & EVANS,
Attorneys for Plaintiff,

Per J. W. BAYARD.

To George Brodbeck, Clerk, U. S. D. C.

55

Assessment of damages (No. 5623).

(Filed December 29, 1919.)

I assess damages as above.

E. G. JOHNSON,
Deputy Clerk District Court United States, Eastern District of Pennsylvania.

Judgment (No. 5628).

(Filed December 29, 1919.)

Before Dickinson, J.

And now, December 29, 1919, in accordance with præcipe filed, judgment in the above-entitled case for want of sufficient affidavit of defense, is hereby entered in favor of plaintiff for \$4,911.58, and against the defendant.

By the Court.

Attest: E. G. JOHNSON,
Deputy Clerk.

Præcipe for judgment (No. 5800).

(Filed December 29, 1919.)

The clerk will enter judgment for the plaintiff upon a rule for judgment for want of a sufficient affidavit of defense in the above-entitled cause, in accordance with the opinion of the court filed upon said rule, and will assess the damages as follows:

Principal of claim.....	\$6,824.02
Interest thereon from the 11th day of June, 1918, to December 29, 1919.....	634.63

Total amount of judgment.....	\$7,458.65
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PRICHARD, SAUL, BAYARD & EVANS,
Attorneys for Plaintiff.

Per J. W. BAYARD.

To George Brodbeck, Clerk U. S. D. C.

56

Assessment of damages (No. 5800).

(Filed December 29, 1919.)

I assess damages as above.

E. G. JOHNSON,
Deputy Clerk District Court United States, Eastern District of
Pennsylvania.

Judgment (No. 5800).

(Filed December 29, 1919.)

Before Dickinson, J.

And now, December 29, 1919, in accordance with præcipe filed, judgment in the above-entitled case for want of sufficient affidavit of

defense, is hereby entered in favor of plaintiff for \$7,458.65, and against the defendant.

By the Court.

Attest: E. G. JOHNSON,
Deputy Clerk.

Defendant's exceptions to conclusions of law and findings of fact

(Filed January 27, 1920.)

And now, to wit, January 27th, 1920, the defendant excepts to the findings of fact and conclusions of law by the learned trial judge as follows:

1. The learned court erred in affirming the plaintiff's sixteen request for conclusions of law as follows:

"16. Under the will of Alexander J. Derbyshire, deceased, to all the residue of his estate, including all income thereon, vested in the contributors to the Pennsylvania Hospital; said corporation is not entitled to the possession thereof until the death of the surviving annuitants."

2. The learned court erred in affirming the plaintiff's eighteen request for conclusions of law as follows:

"18. A devise of income or principal for such a charity, whether vested in possession of the said charity or not, is not subject to taxation under the revenue act of 1913."

3. The learned court erred in affirming the plaintiff's nineteen request for conclusions of law as follows:

"19. A devise of income or principal for such a charity, whether vested in possession of the said charity or not, is not subject to taxation under the revenue act of 1916 or the war revenue act of 1917."

4. The learned court erred in affirming the plaintiff's twenty request for conclusions of law as follows:

"20. The plaintiff is therefore entitled to recover from the defendant the amounts paid by him as taxes upon the income of said estate together with interest thereon from the date of payment, viz., sum of \$4,273.42 with interest from the 3d day of July, 1917, and sum of \$6,824.32 with interest from the 11th day of June, 1918."

Answer.

The answer of the learned court to the plaintiff's requests was as follows:

"Requests 16, 17, 18 and 19 are found as requested.

"The conclusion with respect to request 20 is that judgment may be entered in each of the cases before us for such sum as counsel may agree to be the correct sum in each case. We retain jurisdiction of the causes to find and determine the amounts which judgment may be entered in the event that counsel fail to so agree."

5. The learned court erred in refusing to affirm the defendant's first request for findings of fact as follows:

"1. The income of the trust fund upon which the tax was assessed is being accumulated under the terms of the will of Alexander J. Derbyshire."

6. The learned court erred in refusing to affirm the defendant's second request for findings of fact as follows:

"Under the terms of the said will as construed by the Supreme Court of Pennsylvania the corpus of the trust with its accumulations can not be paid over to the contributors of the Pennsylvania Hospital, until after the death of all of the life tenants, one of whom is still living, and not until all other claims against the estate, including the annuities, have been satisfied. *Biddle's Appeal*, 99 Pa. 519."

7. The learned court erred in refusing to affirm the defendant's third request for findings of fact as follows:

"The said trust is active during the life of the annuitants."

8. The learned court erred in refusing to affirm the defendant's first request for conclusions of law as follows:

"The income upon which the tax is levied is not now income of the Contributors to the Pennsylvania Hospital, but is income of the trust under the will of Alexander J. Derbyshire."

59 9. The learned court erred in refusing to affirm the defendant's second request for conclusions of law as follows:

"The income of the said trust fund has not been 'received' by the Pennsylvania Hospital, within the meaning of the exempt income clauses of the acts under which the taxes were assessed."

10. The learned court erred in refusing to affirm the defendant's third request for conclusions of law as follows:

"The income upon which the taxes were assessed is not exempt under any of the exempt income clauses set forth in the revenue acts under which the taxes were assessed."

11. The learned court erred in refusing to affirm the defendant's fourth request for conclusions of law as follows: "The said taxes were legally collected."

12. The learned court erred in entering judgment against the defendant and in favor of the plaintiff.

13. The learned court erred in not entering judgment in favor of the defendant and against the plaintiff.

FRANCIS FISHER KANE,
United States Attorney.

Philadelphia, Pa., January 27, 1920.

Exception allowed.

(Signed) DICKINSON, J.

60

Petition for writ of error.

(Filed February 4, 1920.)

To the Honorable, the Judges of the said Court:

Ephraim Lederer, the above-named defendant, conceiving himself to be aggrieved by the judgment entered on the 29th day of Decem-

ber, 1919, hereby prays for a writ of error therefrom, for the reasons specified in the assignment of errors filed herewith, and further prays that said writ be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was entered duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.)

FRANCIS FISHER KANE,
*United States Attorney,
Attorney for Defendant.*

Order allowing writ of error.

(Filed February 4, 1920.)

Before Dickinson, J.

And now, this 4th day of February, 1920, it is ordered that the foregoing writ of error be allowed as prayed.

By the Court.

Attest:

GEORGE BRODBECK, *Clerk.*

Assignments of error.

(Filed February 4, 1920.)

And now, to wit, February 4th, 1920, comes Ephraim Lederer, plaintiff in error and defendant below, and, having prayed
61 writ of error from the judgment entered in favor of the plaintiff on the 29th day of December, 1919, says that:

1. The learned court erred in affirming the plaintiff's sixteenth request for conclusions of law as follows:

"16. Under the will of Alexander J. Derbyshire, deceased, title to all the residue of his estate, including all income thereon is vested in the contributors to the Pennsylvania Hospital; but said corporation is not entitled to the possession thereof until the death of the surviving annuitants."

2. The learned court erred in affirming the plaintiff's eighteenth request for conclusions of law as follows:

"18. A devise of income or principal for such a charity, whether vested in possession of the said charity or not, is not subject to taxation under the revenue act of 1913."

3. The learned court erred in affirming the plaintiff's nineteenth request for conclusion of law as follows:

"19. A devise of income or principal for such a charity, whether vested in possession of the said charity or not, is not subject to taxation under the revenue act of 1916 or the war revenue act of 1917."

4. The learned court erred in affirming the plaintiff's twentieth request for conclusion of law as follows:

"20. The plaintiff is therefore entitled to recover from the defendant the amounts paid by him as taxes upon the income of said estate, together with interest thereon from the date of payment, viz.: the sum of \$4,273.42 with interest from the 3rd day of July, 1917, and the sum of \$6,824.32 with interest thereon from the 11th day of June, 1918."

62

Answer.

The answer of the learned court to the plaintiff's requests was as follows:

"Requests 16, 17, 18 and 19 are found as requested.

The conclusion with respect to request 20 is that judgment may be entered in each of the cases before us for such sum as counsel may agree to be the correct sum in each case. We retain jurisdiction of the causes to find and determine the amounts for which judgment may be entered in the event that counsel fail to so agree."

5. The learned court erred in refusing to affirm the defendant's first request for findings of fact as follows:

"1. The income of the trust fund upon which the tax was assessed is being accumulated under the terms of the will of Alexander J. Derbyshire."

6. The learned court erred in refusing to affirm the defendant's second request for findings of fact as follows:

"Under the terms of the said will as construed by the Supreme Court of Pennsylvania the corpus of the trust with its accumulations cannot be paid over to the contributors of the Pennsylvania Hospital until after the death of all of the life tenants, one of whom is still living, and not until all other claims against the estate, including the annuities, have been satisfied. Biddle's Appeal, 99 Pa. 519."

7. The learned court erred in refusing to affirm the defendant's third request for findings of fact as follows: •

"The said trust is active during the life of the annuitants."

8. The learned court erred in refusing to affirm the defendant's first request for conclusions of law as follows:

63 "The income upon which the tax is levied is not now income of the Contributors to the Pennsylvania Hospital, but is income of the trust under the will of Alexander J. Derbyshire."

9. The learned court erred in refusing to affirm the defendant's second request for conclusion of law as follows:

"The income of the said trust fund has not been 'received' by the Pennsylvania Hospital, within the meaning of the exempt income clauses of the acts under which the taxes were assessed."

10. The learned court erred in refusing to affirm the defendant's second request for conclusions of law as follows:

"The income upon which the taxes were assessed is not exempt under any of the exempt income clauses set forth in the revenue acts under which the taxes were assessed."

11. The learned court erred in refusing to affirm the defendant's fourth request for conclusions of law as follows: "The said taxes were legally collected."

12. The learned court erred in entering judgment against the defendant and in favor of the plaintiff.

13. The learned court erred in not entering judgment in favor of the defendant and against the plaintiff.

FRANCIS FISHER KANE,
United States Attorney.

PHILADELPHIA, PA., *January 4, 1920.*

64 *Præcipe for transcript of record.*

(Filed February 2, 1920.)

SIR: In making up the transcript of record sur writ of error in the above entitled cause, include the following papers and no others:

Docket entries.

Statement of claim,

Affidavit of defense,

Stipulation waiving trial by jury,

Testimony.

Opinion, Dickinson, J.,

Præcipe to enter judgment,

Judgment,

Bill of exceptions,

Petition for writ of error and order allowing same,

Assignments of error,

Findings of fact and conclusions of law,

Clerk's certificate.

FRANCIS FISHER KANE,
United States Attorney.

65 *Clerk's certificate.*

EASTERN DISTRICT OF PENNSYLVANIA, } *set.:*
United States of America,

I, George Brodbeck, clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the cases of Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire, deceased, *vs.* Ephraim Lederer, Collector of Internal Revenue, No. 5628, June Term, 1918; and Alexander D. Stockton, sole surviving trustee, etc., *vs.* Ephraim Lederer, Collector of Internal Revenue, No. 5800, September term, 1918, as per præcipe filed, a copy of which is hereunto attached, the transcript of record in the above entitled causes is to include, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 5th day of March, in the year of our Lord one thousand nine hundred and twenty and in the one hundred and forty-fourth year of the Independence of the United States.

[SEAL.]

GEORGE BRODBECK,
*Clerk District Court United States,
Eastern District of Pennsylvania.*

66 In the United States Circuit Court of Appeals for the
Third Circuit.

No. 2547 (List No. 38), March Term, 1920.

EPHRAIM LEDERER, COLLECTOR, PLAINTIFF IN ERROR,

vs.

ALEXANDER D. STOCKTON, TRUSTEE UNDER WILL OF ALEXANDER J.
DERBYSHIRE, DECEASED, DEFENDANT IN ERROR.

And afterwards, to wit, on the nineteenth day of April, 1920, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. Victor B. Woolley, and Hon. Thomas G. Haight, Circuit Judges, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the eighth day of July, 1920, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL
revenue for the first district of Pennsylvania,
plaintiff in error,

vs.

March Term, 1920.
No. 2547.

ALEXANDER D. STOCKTON, SOLE SURVIVING
trustee under the will of Alexander J. Derbyshire,
deceased, defendant in error.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

Before Buffington, Woolley, and Haight, Circuit Judges.

BUFFINGTON, *Circuit Judge*: In the court below Stockton, trustee under the will of Alexander J. Derbyshire, brought suit and re-

covered a verdict against Lederer, United States collector of internal revenue, to recover income taxes illegally, as he alleged, collected from him. On entry of judgment on such verdict the defendant sued out this writ:

By his will Alexander J. Derbyshire, who died in 1879, devised his residuary estate to "the Contributors to the Pennsylvania Hospital," a corporation of Pennsylvania, created for charitable uses and purposes, and no part of the net income thereof is "for the benefit of any private stockholder or individual."

67 The devise was subject to the payment to certain annuitants, all of whom, save one, have died. The residuary estate amounts to several hundred thousand dollars; its annual income is substantially \$15,000 and upwards, and the remaining annuity is for a few hundred dollars per year. The construction of the will came before the Supreme Court of Pennsylvania in Biddle's Appeal, 99 Pa. St. 525, wherein the title to the residuary estate was adjudged vested in the hospital, the court saying: "The residuary devise, being in trust for a charitable use and purpose, comes within the proviso to the 9th section of the act of 18th April, 1853, and therefore is not within the prohibitory clause of the section forbidding accumulations after the death of the testator, for a term longer than therein specified." The court further held that it should not be paid to the hospital until after the death of all the annuitants. As stated by the court below in its opinion, "Resort was then had to the practical expedient of the trustee investing the funds of the estate in the form of a loan to the institution representing the charity, upon which loan the charity paid an interest sufficient to take care of the administrative charges and the payment of the annuities. The annuities have all fallen in except one small one."

It will thus be seen that while the residuary estate remains theoretically and for purposes of accounting in the hands of the trustee, it is already in the possession of the hospital in the shape of money loaned on mortgage and upon such loan the hospital is paying to the trustee only such interest as takes care of administrative charges and the surviving annuity. Under such circumstances the collector assessed and collected, under protest, from the trustee on June 26, 1917, the sum of \$4,273.42, being on the income of the residuary estate for the years 1913-14-15 and 16, and on June 11, 1918, an income and excess profit tax of \$6,842.02 upon the income of the residuary estate of 1917. It is, of course, apparent the trustee has no financial interest in the residuary payment, and while this large sum is in theory assessed as a tax on income received by the trustee or the testator's estate, the whole sum is paid at the expense and from the property of the hospital. The question, then, in substance and practice, resolves itself into this: Is this hospital liable for income tax?

In view of the fact that Congress in the pertinent taxing act of 1913 said, "All persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies,

except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and *income of another person subject to tax* shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return," etc., * * * "That nothing in this section shall apply * * * to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual," it follows that he who construes and applies that statute to warrant taxation of a charity is doing what Congress said should not be done, viz: "That nothing in this section shall apply," etc.

So also when Congress in the act of 1916 again said, "That
68 there shall not be taxed under this title any income received by any * * * corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual," it follows that he who taxes, under this statute, the income of a hospital is taxing that which Congress expressly said should not be taxed, viz: "That there shall not be taxed under this title any income received by any * * * corporation for * * * charitable purposes."

As justification for assessing this tax, it is contended, however, that as the act of 1916 forbids taxation on "any income received by any * * * corporation * * * for * * * charitable * * * purposes," that the income of this residuary estate was not exempt because it has not been "received" but remains in the hands of the trustee. But apart from the fact that the corpus of the residuary estate has in fact already been "received" by the hospital in the shape of a mortgage and the hospital itself is pro forma paying to its own trustee the money which, pro forma, constitutes the income here taxed, the construction thus urged and the effect given to the word "received" does not commend itself to our judgment. The sections in question in the acts of 1913 and 1916 are to be considered and construed jointly. They concern the same subject matter, and that of 1916 was evidently meant to continue the broad and absolute purpose and provisions of the act of 1913 "that nothing in this section shall apply * * * to any corporation * * * operated exclusively for * * * charitable * * * purposes." Such being the case, the residuary estate which produced this income being the property solely of the hospital, no one but the hospital owning the income thereof and the temporary holding of the income being by a trustee who was the agent and representative solely of the hospital, it is clear that when substance and spirit and not mere form and words are the interpreters of the statute, the receipt of this income by the hospital's agent and representative was in truth and reality a receiving by the hospital, for he who acts by the hand of another himself acts. If this income was received from a third per-

son by the trustee and afterwards lost, surely the hospital could never have collected it again from such third person on the theory that the hospital had never received it. Moreover, it will also appear that if the trustee had, without protest, used the money of the hospital to pay this income tax, such trustee could not on settlement of his trusteeship have justified such payment under Section II of the act of 1913, for that section only warrants such deduction and withholding where the income is the "income of another person *subject to tax*," and elsewhere, as we have seen, the same section provided "that nothing in this section shall apply * * * to any corporation * * * operated exclusively for * * * charitable * * * purposes."

From the above it is clear to us, first, that the United States, the taxing power and real defendant in this case, speaking by its legislative branch in plain language, enacted its purpose and will to exempt from taxation the income of "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual"; second, that the action of the United States by its executive officer, in
69 this case, the collector of internal revenue, in assessing and collecting this income tax from the hospital was not warranted by the taxing statutes; and third, that it is the duty of the United States, acting by its third agency, the Federal courts, to prevent its executive branch from illegally defeating its expressed will in the law enacted by its legislative branch.

It follows, therefore, that the judgment entered by the Court below in favor of the hospital and against the collector, should be and is affirmed.

Endorsements: 2547, opinion of the court by Buffington, J., received and filed July 8, 1920. Saunders Lewis, jr., clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2547 (list No. 38). March term, 1920.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA, PLAINTIFF IN ERROR,

vs.

ALEXANDER D. STOCKTON, SOLE SURVIVING TRUSTEE UNDER THE WILL OF ALEXANDER J. DERBYSHIRE, DECEASED, DEFENDANT IN ERROR.

In error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

JOS. BUFFINGTON,
Circuit Judge.

Philadelphia, July 8, 1920.

Endorsements: 2547, order affirming judgment received and filed July 8, 1920. Saunders Lewis, jr., clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *set.*
Third Judicial Circuit.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Ephraim Lederer, collector, plaintiff in error, *vs.* Alexander D. Stockton, trustee, defendant in error, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this fourth day of September, in the year of our Lord one thousand nine hundred and twenty, and of the independence of the United States the one hundred and forty-fifth.

[SEAL.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

70 UNITED STATES OF AMERICA, ss:
The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[SEAL.]

Being informed that there is now pending before you a suit in which Ephraim Lederer, collector of internal revenue for the first district of Pennsylvania, is plaintiff in error, and Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire, deceased, is defendant in error, No. 2547, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

1 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 27,900. Supreme Court of the United States, No. 543, October term, 19—. Ephraim Lederer, collector of internal revenue, etc., vs. Alexander D. Stockton, sole surviving trustee, etc. Office of the clerk, Supreme Court U. S., received Nov. 8, 1920. Writ of certiorari.

72 In the Supreme Court of the United States, October term, 1920.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL revenue, etc., petitioner, vs.	} No. 543.
ALEXANDER D. STOCKTON, SOLE SURVIVING trustee, etc.	

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Third Circuit, to the writ of certiorari granted therein.

WM. L. FRIERSON,
Solicitor General.

H.
JAMES WILSON BAYARD,
Counsel for Respondent.

October 28, 1920.

(Endorsements: 2547. Stipulation of counsel for return to writ of certiorari. Received & filed Nov. 6, 1920. Saunders Lewis, jr., clerk.

73 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania } SCT.
Third Judicial Circuit.

I, William P. Rowland, deputy clerk of the United States Circuit Court of Appeals, for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed in this court for return to writ of certiorari in the case of Ephraim Lederer, collector, petitioner, vs. Alexander D. Stockton, trustee, on file, and now remaining among the records of the said court, in my office.

[SEAL.]

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixth day of

November, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States the one hundred and forty-fourth.

WM. P. ROWLAND,
*Deputy Clerk of the U. S. Circuit
Court of Appeals, Third Circuit.*

74 (Indorsed:) No. —. Term, 191—. United States Circuit Court of Appeals, Third Circuit. Certified copy.

75 (Indorsed:) File No. 27,900. Supreme Court U. S., October term, 1920. Term No. 543. Ephraim Lederer, collector of internal revenue, etc., petitioner, vs. Alexander D. Stockton, sole surviving trustee, etc. Writ of certiorari and return. Filed Nov. 8, 1920.

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